

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GREG BALLARD,

Plaintiff,

V.

BANK OF AMERICA, N.A., et al.,

Defendants.

CASE NO. C10-5668BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS AND DENYING
PLAINTIFF'S MOTION
FOR DEFAULT

This matter comes before the Court on the joint motion to dismiss under Rule 12(b)(6) (failure to state a claim) filed by Defendants Bank of America, N.A. (“BofA”) and ReconTrust Company, N.A. (“Recon”) (Dkt. 24). Also before the Court is Plaintiff’s (“Ballard”) motion for default (Dkt. 30). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants BofA and Recon’s motion to dismiss, denies Ballard’s motion for default, and orders Ballard to show cause for the reasons stated herein.

I. PROCEDURAL HISTORY

On August 16, 2010, Ballard filed his complaint against multiple Defendants in Pierce County Superior Court (Case No. 10-2-12111-6). Dkt. 2. On September 17, 2010, BAC Home Loan Servicing LP’s (“BAC”) removed the action pursuant to this Court’s diversity jurisdiction. Dkt. 1.

On January 12, 2011, the Court granted BAC's motion to dismiss. On January 20, 2011, BofA and Recon filed a joint motion to dismiss Ballard's claims against them under Fed. R. Civ. P. 12(b)(6). Dkt. 24. Ballard missed the deadline for filing a timely response

1 in opposition. However, Ballard remained on notice as to what is required to defend
 2 against such a motion. *See* Dkt. 19 (describing the need for Ballard to file a response
 3 supported by, among other things, affidavits or declarations).

4 On February 11, 2011, the Court extended the time in which Ballard was permitted
 5 to respond to BofA and Recon's joint motion to dismiss. Dkt. 29. On February 23, 2011,
 6 Ballard timely responded. Dkt. 31. On February 25, 2011, BofA and Recon timely
 7 replied. Dkt. 32.

8 Additionally, on February 23, 2011, Ballard moved for default against BofA and
 9 Recon. Dkt. 30. No response or reply has been filed regarding this motion.

11 **II. FACTUAL BACKGROUND**

12 This matter arises out of Ballard's challenge to the foreclosure of his property,
 13 located in Puyallup, Washington. *See* Complaint; *see also* Declaration of Kathleen Nelson
 14 ("Nelson Decl."), Ex. A (promissory note) and Ex. B (deed of trust). Ballard's house was
 15 foreclosed upon at a trustee's sale held on July 9, 2010. Complaint (Dkt. 2-3) ¶ 10.

16 Ballard asserts four causes of action: (1) Defendants have "endorsed, deposited,
 17 transferred, altered, destroyed, and/or mutilated" various documents; (2) BAC never
 18 responded to Ballard's "Notice of Tender of Payment"; (3) Defendants have committed
 19 fraud against various entities, Washington's citizens, Washington's government, and
 20 others; and (4) BofA "never lent any of their own assets in this initial commercial
 21 transaction as they fraudulently claimed." *See*, e.g., Complaint at 5-7.

22 **III. DISCUSSION**

23 **A. Rule 12(b)(6) Standard**

24 Federal Rule of Civil Procedure 12(b)(6) permits challenge of a complaint for
 25 "failure to state a claim upon which relief can be granted." A court's inquiry "is limited to
 26 the allegations in the complaint, which are accepted as true and construed in the light
 27 most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th
 28

1 Cir. 2008). A defendant bears the burden of proving plaintiff has failed to state a claim.
 2 *See, e.g., Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005); *Bangura v. Hansen*,
 3 434 F.3d 487, 498 (6th Cir. 2006); James Wm. Moore, 2 Moore's Federal Practice §
 4 12.34[1][a] at 12-73 (2008 ed.).

5 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Davis v. Monroe*
 6 *County Bd. of Educ.*, 526 U.S. 629, 633 (1999); *North Star Int'l v. Arizona Corp.*
 7 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or any claim
 8 within it "can be based on the lack of a cognizable legal theory or the absence of
 9 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police*
 10 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Robertson v. Dean Witter Reynolds,*
 11 *Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

12 **B. Judicial Notice**

13 The Court may take judicial notice of publicly recorded documents without
 14 converting the instant motion to one for summary judgment. *Shaw v. Hawn*, 56 F.3d
 15 1128, 1129 n. 1 (9th Cir. 1995). The Court may also consider documents attached to the
 16 complaint or those referred to in the complaint without converting the instant motion into
 17 one for summary judgment. *See, e.g., United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
 18 2003).

20 Therefore, the Court considers Ballard's note and deed of trust because Ballard
 21 attached the deed of trust to his complaint and referred to both documents in his
 22 complaint.

23 **C. BofA and Recon's Motion to Dismiss**

24 **1. Count One**

25 BofA and Recon move to dismiss Ballard's Count One because it is "vague and
 26 illusory" and fails to provide fair notice as to the claims asserted therein. Dkt. 24 at 4.
 27 Ballard did not respond in opposition to BofA and Recon's arguments on this issue.
 28

1 The Court has reviewed the allegations contained in Ballard's Count One. The
2 complaint does not state any particular claim for which relief can be granted, and it is
3 wholly unclear as to what Ballard alleges in reality. The only possibility that the Court
4 can ascertain is that Ballard complains that BofA and Recon do not possess the original
5 documents (e.g., original mortgage and/or deed of trust).

6 However, as this Court and other courts have routinely held, such a "show me the
7 note" argument lacks merit. *See, e.g., Freeston v. Bishop, White & Marshall, P.S.*, 2010
8 WL 1186276 (W.D. Wash., Mar. 24, 2010) (quoting *Diessner v. Mortgage Electronic
9 Registration Systems*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (collecting cases)). To
10 the extent Ballard is alleging something else, it is not cognizable and, therefore, dismissed
11 for failure to state a claim upon which relief can be granted.

12 Additionally, the complaint fails to meet the fair notice pleading requirements as
13 articulated in *Twombly* and *Iqbal*. *See Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937,
14 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

16 **2. Count Two**

17 Ballard's Count Two is not directed at either BofA or Recon. Therefore, it is
18 dismissed as against them.

19 **3. Count Three**

20 Because Ballard has not pleaded fraud with specificity, as required under Fed. R.
21 Civ. P. 9(b), Count Three is dismissed as against BofA and Recon.

22 **4. Count Four**

23 To begin with, Ballard's Count Four is dismissed as against Recon because it is
24 not directed toward Recon.

25 BofA moves to dismiss Count Four as it is "so vague and illusory" that it does not
26 provide fair notice as to the claims being made against BofA. Ballard did not respond in
27 opposition to BofA's argument on this issue.

1 The Court has reviewed the allegations contained in Ballard's Count Four. The
2 complaint does not state any particular claim for which relief can be granted, and it is
3 wholly unclear as to what Ballard alleges in reality. The only possibility that the Court
4 can ascertain is that Ballard complains that BofA committed fraud or conspiracy to
5 commit fraud. However, Ballard has not adequately pleaded the elements of fraud, which
6 requires specificity. *See* Fed. R. Civ. P. 9(b). Therefore, the Court dismisses this claim as
7 against BofA.

8 **D. Ballard's Motion for Default**

9 Ballard's motion for default is denied with prejudice, as BofA and Recon have
10 appeared and defended in this action, which prohibits entry of default. *See* Fed. R. Civ. P.
11 55 (requiring party against whom relief is sought to have failed to plead or otherwise
12 defend).

13 **E. Motion to Amend**

14 Ballard references reserving his right to amend his complaint in this case (Dkt. 31
15 at 4), yet he has not moved the Court for leave to amend. *See* Fed. R. Civ. P. 15. The
16 Court is unlikely to grant leave at this point because Ballard has not opposed the
17 arguments made in favor of dismissal and the Court remains unconvinced that amendment
18 would cure Ballard's complaint, which is plagued with deficiencies.

19 **F. Show Cause**

20 Ballard is ordered to show cause why the Court should not dismiss his claims as to
21 all remaining Defendants. The only remaining Defendants after the filing of this order are
22 unknown people and entities. *See* Complaint (naming John and Jane Does I-V, Black &
23 White Corporations VI-X, and ABC Partnerships XI-XV). Ballard shall respond to the
24 show cause order on or before March 30, 2011. Failure to respond will likely result in
25 dismissal of this action against all remaining parties and the case will thereafter be closed.
26

IV. ORDER

Therefore, it is hereby **ORDERED** that

(1) BofA and Recon's motion to dismiss (Dkt. 20) is **GRANTED** and Ballard's claims against them are **DISMISSED**;

(2) Ballard is ordered to **SHOW CAUSE** as discussed herein.

DATED this 15th day of March, 2011.



BENJAMIN H. SETTLE
United States District Judge